

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1122

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

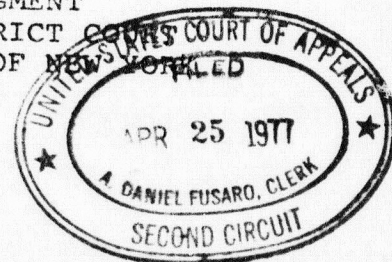
Bp/s

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
ROBERT L. HOPKINS,
Defendant-Appellant.

Docket No. 77-1122

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ROBERT L. HOPKINS
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

CRIMINAL DOCKET - U.S. District Court

TY OFFENSE PO	JUDGE/MAGISTRATE Assigned	U.S.
OR OFFENSE MO	0208 1 0862	vs. HOPKINS, ROBERT L.
SD MEANOR Mis	Disp./Sentence	(LAST, FIRST, MIDDLE)
FELONY Fel	District Office	

Case Filed
Mo. Day
11 12
No. of Dets
* 01

76 1060 01
Yr. Docket No.

JUVENILE

U.S. MAG.
CASE NO.

BAIL • RELEASE

☐ Denied	☐ AMT Set	☐ Fugitive	☐ Pers. Recog.
☐ Date	☐ PSA	☐ 10% Deposit	☐ Surety Bond
☐ Bail Not Made	☐ Collateral	☐ 3rd Party Cust	☐ Other
☐ Status Changed (See Docket)			

U.S. TITLE/SECTION	OFFENSES CHARGED	ORIGINAL COUNTS
18:656	Bank embezzlement by employee	1-2
18:1005	Making fake false entries in bank records	3-4
18:656	Bank embezzlement by employee	1-2
18:1005	Making false entries in bank records	3-4

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL	SENTENCE
U.S. Custody Began 11-22-76	High Risk Date 11-12-76	11-18-76	Trial Set For 1--24-77	Disposition of Charges 2-4-77
Summons Served	Indict. Waived	1st Plea 11-18-76	Voir Dire ☐	☒ Convicted
First Appearance	In Charging District	Final Plea	Trial Began 2-1-77	☐ Acquitted
	Superseding Indict/Info 1-31-77		Trial Ended 2-4-77	☐ Dismissed
				☐ On Government's Motion

SEARCH WARRANT	DATE	INITIAL/NO.	MAGISTRATE	INITIAL/NO.	OUTCOME
Issued			INITIAL APPEARANCE DATE		☐ DISMISSED
Return			PRELIMINARY EXAMINATION OR REMOVAL HEARING		☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
Issued			WAIVED ☐ NOT WAIVED ☐		☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW
Served			INTERVENING INDICTMENT		
Arrest Warrant Issued			Tape Number		
COMPLAINT					
OFFENSE (In Complaint)					

U.S. Attorney or Asst.

Allen R. Bentley
791-1935

ATTORNEYS

Defense ☐ CJA ☐ Ret ☐ Waived ☐ Self ☐ None / Other ☐ FD ☐ CD

208

* Show last names and suffix numbers of other defendants on same indictment/information.

DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCLUDABLE DELAY (a) (b) (c) (d)
11-12-76		Filed Indictment.....Cooper, J.	
11-18-76		No appearance. B/W ordered. Court directs entry of not guilty plea. Bail fixed in the amt. of \$5,000. P.R.B. to be co-signed by a parent of deft. Case assigned to Judge Owen for all purposes. Cannella, J.	
11-18-76		Bench Warrant Issued	
11-22-76		Deft. Picked Up & Remanded.....Owen J.	
11-23-76		Deft. Present with Atty. Thomas Concannon, Bail set at \$5,000.00 PRB Co-Signed by Mother. Bond to be completed by 11-24-77. Trial Set for 1-24-76 at 10:00 A.M. Deft. Ordered Fingerprinted & Photographed...Owen J.	
11-24-76		Filed PRB in the amt. of \$5,000.00 Unsecured. Co-Signed by Mother Eileen Dehio's.	
1-24-77		Filed Warrant for Arrest - Executed on 11-22-76	

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		Interval (3)	Sub- Interval (4)	Ltr Code (5)	Total Days (6)
1-31-77	Filed Govts. Requests for Voir Dire.				
1-31-77	Filed Govts. Request to Charge.				
1-31-77	Filed Superseding Indictment & referred to Owen, J.Pierce, J.				
2-1-77	Govt. Files Superseding Indict S76 Cr.1060 to Trial on Super- ceding Indict.....Owen J.				
2-1-77	Jury Empanelled Case Proceeds to Trial - Trial Begun.				
2-2-77	Trial Cont'd.				
2-3-77	" "				
2-4-77	" " & Concluded. Verdict Guilty on All Cts.- 1,2,3,&4. Sentence for 3-10-77 at 2:15 pm. Rm.1505. PSI Ordered. Bail Increased to \$5,000.00 Cash or Surety to be posted by 2-14-77 at 10:00 am. or dft. to be remanded.....Owen J.				
2-15-77	Dft. Present with atty. Lipson for Bail application - Bail set at \$5,000.00 PRB until time of Sentence.....Owen J.				
3/11/77	Filed Unsecured PRB pending appeal in the Amt. of \$5,000.00 Co-Signed By Mother Eileen Daniels.				
3/11/77	Filed Dfts. Notice of Appeal from Judgment dtd. 3/10/77. (mailed notice)				
3/10/77:	Filed Judgment & Commitment (Atty. Jack Lipson Present) The Dft. is hereby committed to the custody of the Atty. Gen. or his authorized representative for imprisonment for a period of NINE (9) MONTHS ON COUNT 1 and 3 to run concurrently with each other. Imposition of sentence is suspended & dft is placed on probation on counts 2 & 4 for THREE (3) YEARS to run consecutively with prison term.....Owen J. Issued Commitment 3-10-77.				
3/11/77	Filed Notice of Appeal from Judgment 3/10/77.(mailed notice)				
3/11/77	Dft. (US Atty Allen Bentley & dfts. Atty Jack Lipson present Dft. sentenced to Cts. 1 & 3 to a term of 9 months to run concurrently with each other. Imposition of sentence is suspended & dft. placed on probation on cts. 2 & 4 for 3 Yrs. to run consecutively with the prison term. Dft. notified to file Notice of Appeal. Clerk filed. Bail cont'd pending appeal. New bond to be filed. Motion granted to Nolle IndictmentOwen J.				

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v -

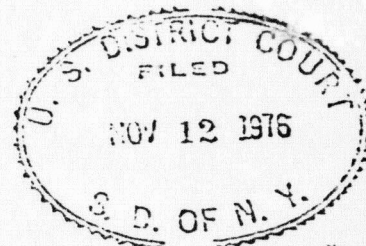
ROBERT L. HOPKINS,

Defendant.

: INDICTMENT

: 76 Cr.

-x



COUNTS ONE AND TWO

The Grand Jury charges:

On or about the dates hereinafter set forth, in the Southern District of New York, ROBERT L. HOPKINS, the defendant, being an employee of the Bankers Trust Company, 85 Delancey Street, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation, unlawfully, wilfully and knowingly did embezzle, abstract and purloin moneys, funds, assets and securities intrusted to the custody and care of said bank and to the custody and care of ROBERT L. HOPKINS, the defendant, namely, cash contained in night deposit bags deposited with the Bankers Trust Company by Cohen Optical Company, 117 Orchard Street, New York, New York, in the approximate amounts hereinafter set forth:

<u>COUNT</u>	<u>DATE</u>	<u>BAG NUMBER</u>	<u>AMOUNT</u>
1	February 1, 1974	693	\$11,055
2	February 4, 1974	523	\$ 3,769

(Title 18, United States Code, Section 656.)

COUNTS THREE AND FOUR

The Grand Jury further charges:

On or about the dates hereinafter set forth, in the Southern District of New York, ROBERT L. HOPKINS, the defendant, being an employee of the Bankers Trust Company,

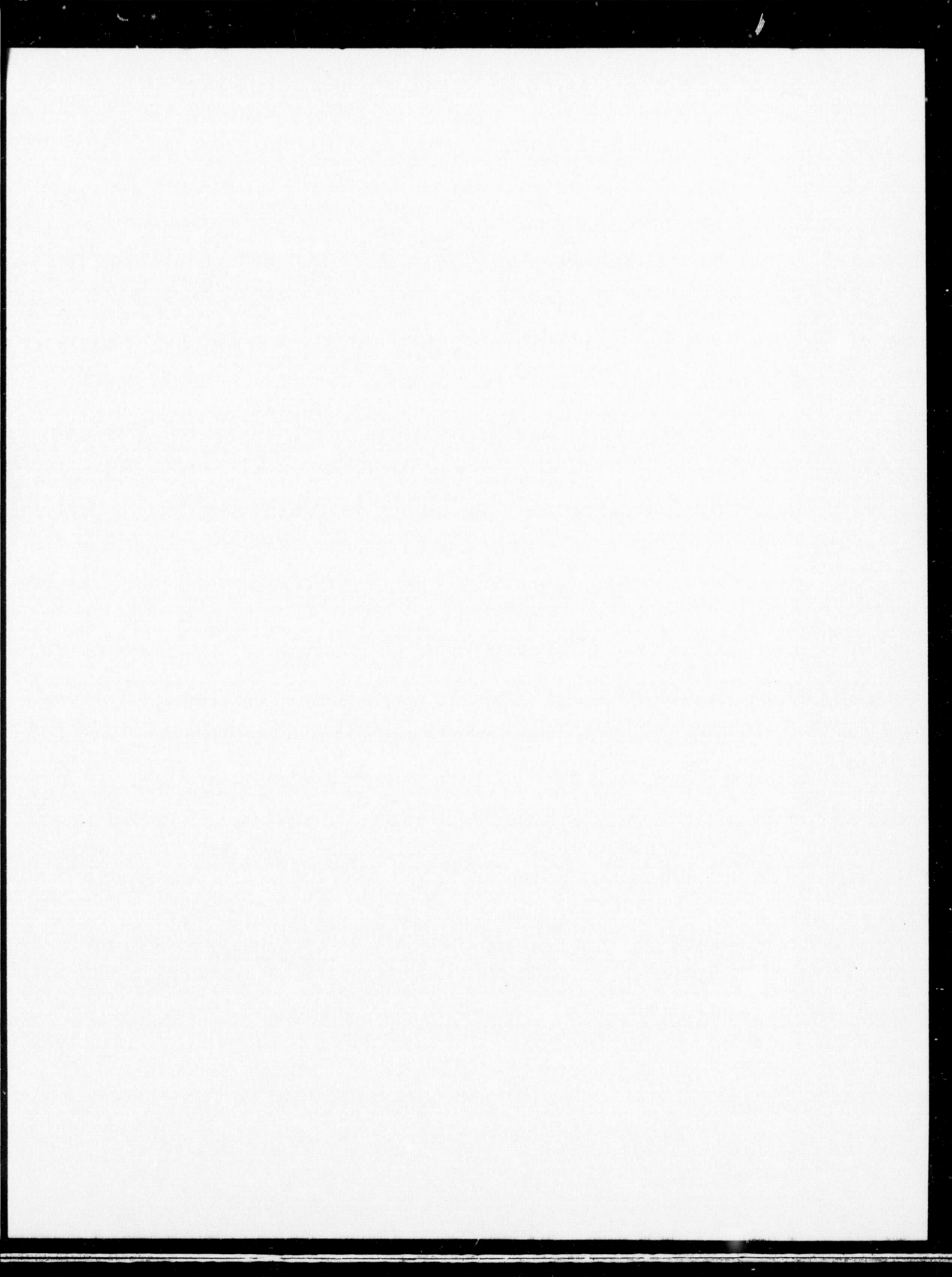
85 Delancey Street, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation, unlawfully, wilfully, knowingly and with intent to injure and defraud such bank and another company, namely, Cohen Optical Company, 117 Orchard Street, New York, New York, and to deceive an officer of such bank, did make false entries in the books, reports and statements of the Bankers Trust Company as hereinafter set forth:

<u>COUNT</u>	<u>DATE</u>	<u>NATURE OF THE BOOK, REPORT AND STATEMENT</u>
3	February 1, 1974	Night Depository Deposit Control Sheet
4	February 4, 1974	Night Depository Deposit Control Sheet

(Title 18, United States Code, Section 1005.)

Willie D. Crouch
FOREMAN

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney



United States District Court
SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

ROBERT L. HOPKINS,

Defendant.

INDICTMENT

76 Cr.

(18 U.S.C. §§ 656 & 1005.)

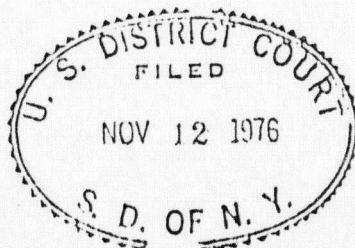
ROBERT B. FISKE, JR.

United States Attorney.

A TRUE BILL

Willie D. Crouch

Foreman.



JUDGE OWEN

11-18-76 - No appearance by defendant.
B/W ordered. Court directs a not
guilty plea be entered. Bail fixed
in amount of \$5000. PRB - to be co-
signed by a parent of deft. Case
assigned Owen J. for all purposes.
Ad Cannella.

NOV 22 1976 DEFT PICKED UP + REMINDED

Owen, J.

NOV 23 1976 - DEFT PRESENT WITH 1976. THURSDAY CONFERENCING.

BAIL SET AT \$5,000.00 PRB. CO-SIGNED BY MOTHER. BOND TO BE
COMPLETED BY 11-24-76. TRIAL SET FOR 1-24-77 AT 10:00 A.M.
DEFT. URGENT FINGERPRINTS + PHOTOGRAPHED.

Owen, J.

FEB 1 1977 - CONT. FILED SUPERVISING INDIC. 576 C. 1180.
TO TRIAL ON SUPERVISING INDIC.

Owen, J.

AR3:baej
76-3720
1-1248

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(S) 76 cr 106

UNITED STATES OF AMERICA

- v -

ROBERT L. HOPKINS,

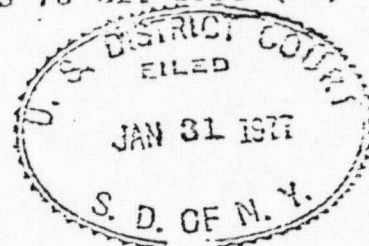
Defendant.

: INDICTMENT

: S 76 Cr. 1060 (RO)

:

: x



COUNTS ONE AND TWO

The Grand Jury charges:

On or about the dates hereinafter set forth, in the Southern District of New York, ROBERT L. HOPKINS, the defendant, being an employee of the Bankers Trust Company, 85 Delancey Street, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation, unlawfully, wilfully and knowingly did embezzle, abstract and purloin moneys, funds and assets intrusted to the custody and care of said bank, namely, cash in amounts in excess of \$100 contained in the night deposit bags described below, which were deposited with the Bankers-Trust Company by Cohen Optical Company, 117 Orchard Street, New York, New York:

<u>COUNT</u>	<u>DATE</u>	<u>BAG NUMBER</u>
1	February 1, 1974	693
2	February 4, 1974	523

(Title 18, United States Code, Section 656.)

COUNTS THREE AND FOUR

The Grand Jury further charges:

On or about the dates hereinafter set forth, in the Southern District of New York, ROBERT L. HOPKINS, the defendant, unlawfully, wilfully, knowingly and with intent to injure and

defraud the Bankers Trust Company, 33 Dulaney Street, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation, and another company, namely, Cohen Optical Company, 117 Orchard Street, New York, New York, and to deceive an officer of said bank, did make false entries in the books, reports and statements of the Bankers Trust Company as hereinafter set forth:

<u>COUNT</u>	<u>DATE</u>	<u>NATURE OF THE BOOK, REPORT AND STATEMENT</u>
3	February 1, 1974	Night Depository Deposit Control Sheet
4	February 4, 1974	Night Depository Deposit Control Sheet

(Title 18, United States Code, Section 1005.)

William R. Towne
FOREMAN

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney

311 137-
 Defendant to the 1+3 & 4 counts. 7 years
 in prison with income tax evasion of the
 1st count and placed in prison on the
 2+4 for 3 years. He was released by parole
 in 1974. Defendant refused to pay the
 fines. Now comes for a new trial.
 Defendant has been found. Motion granted for
 a new trial.
 Owen, J.

(S) 76 CR 1060
 Form No. UGA-33a-271 (Ed. 10-23-68)

United States District Court
 SOUTHERN DISTRICT OF NEW YORK
 THE UNITED STATES OF AMERICA

vs.

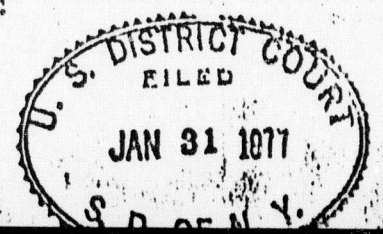
ROBERT L. HOPKINS,
 Defendant.

INDICTMENT

Violation of Title 18, United
 States Code, Sections 656, 1005.

ROBERT B. FISKE, JR.
 United States Attorney.
 A TRUE BILL

Thelma R. Lawrence
 Foreman.



JUDGE OWEN
 January 31, 1977 - Filed Indictment
 and referred to Owen as a
 related case and Pierce Jo
 being related to 76 Cr. 1060.

FEB 1 1977 - JURY EMPOWERED CASE PROCEEDS TO TRIAL
 TRIAL BEGINS

FEB 2 1977 - TRIAL CONT'D.

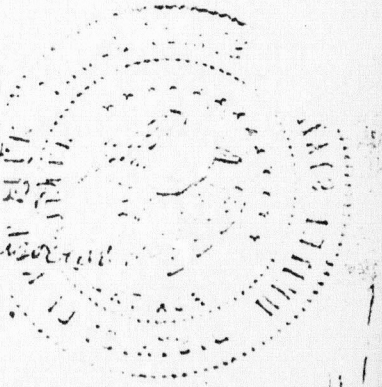
FEB 3 1977 - TRIAL CONT'D.

FEB 4 1977 - TRIAL CONT'D. & CONCLUDED.
 VERDICT GUILTY ON ALL COUNTS - 1, 2, 3 & 4.
 SENTENCE FOR 3-10-77 @ 2:15 P.M. AMSTERDAM.
 P.S.I. ORDERED. BAIL INCREASED TO \$5,000.00
 CASH OR SURETY TO BE POSTED BY 2-14-77 @
 10:00 A.M. OR VOT. TO BE RECONSIDERED.

Owen, J.

FEB 15 1977 - DEPT. PRESENT WITH MOTION
 FOR BAIL APPLIC. BAIL SET AT
 \$5,000.00 PRB UNTIL TIME OF SENTENCING

Owen, J.



Charge of the Court

THE COURT: Ladies and gentlemen, we are at the point in this trial where you are soon to undertake your final function as jurors, and it is here, as I said to you at the beginning of this case, that you are to perform what I regard as one of the most valuable duties and obligations of citizenship in this country, that is, that you are to, in accordance with the instructions that I give you, in accordance with the evidence that you have heard, you are to decide what the facts are in this case, what happened.

You are to do this and discharge your duties with complete fairness, complete impartiality, you are to do it without any bias or prejudice for or against the government or for or against the defendant Hopkins here as parties to this case.

This is an important case, obviously, to both parties, both to the government and to Mr. Hopkins, as well as to the public at large. The fact that the government is a party here entitles it to no greater consideration than that given any other party and in any other case.

By the same token, it is entitled to no less consideration. All parties, whether the government, an individual, a corporation, or whatever, all stand alike and as equals before the bar of justice.

In passing on the fact issues here, which is your role, you are the sole and exclusive judges of those facts. That is not my province. That is your province. You determine the weight of the evidence, you appraise the credibility and believability of the witnesses you have heard, you draw such reasonable inferences from the evidence as you think are warranted, you resolve such conflicts as you may find exist in the evidence, and in doing this I will later give you some thoughts as to how you can be assisted in determining these issues and in determining the questions of credibility or believability that you may find.

My final function as the Judge is to instruct you on the law and it is your duty, I charge you, it is your duty to accept these instructions of mine and to apply them to the facts as you may find them.

With respect to any fact matter, it is your recollection and yours alone that governs as to what the testimony was. I think I may have told you somewhere earlier in this case that anything that any attorney has said in this case with regard to any testimony, whether during the trial, in a question, in an argument, in summation or anywhere else, is not to be substituted for your own recollection of what the evidence was.

So too anything I may have said or may have referred to during the course of the trial or may say during the course of this charge with regard to any matter in evidence is not to be taken in place of your own recollection as to what the testimony was.

If you wish to consider any exhibit you have only to ask for it and it will be made available to you for your consideration. If you have any genuine concern about what the testimony was in any particular you may have that testimony reread to you.

Now, you are to treat my charge, ladies and gentlemen, as an ~~entirety~~ and you are not to concentrate on any single part of it to the exclusion of any other part.

Before I get to the precise charges here let me turn to a few preliminary things. There are certain principles of law which apply in every criminal case. I may have made reference to some of them when you were selected as jurors. I am going to repeat them again.

The indictment is merely a number of pieces of paper. It is merely a charge. It is not evidence of anything. It is not proof of the defendant's guilt. And no weight whatsoever is to be given to the fact that an indictment has been returned here.

The defendant has pleaded not guilty to the charges

2 that are typed upon those pieces of paper. Thus the
3 government at all times throughout the course of this
4 trial has the burden of proving those charges against the
5 defendant beyond a reasonable doubt.

6 A defendant does not have to prove his inno-
7 cence. A defendant does not have to prove anything. On
8 the contrary, a defendant is presumed to be innocent of the
9 charges contained in this indictment.

10 This presumption of innocence was in his favor
11 at the start of the trial, it has continued in his favor
12 during the trial, it is in his favor even as I am in-
13 structing you at this moment, and it remains in his favor
14 during the course of your deliberations in the juryroom.

15 The presumption of innocence is removed only
16 if and only when you are satisfied that the government has
17 sustained its burden of proving the guilt of the defendant
18 beyond a reasonable doubt. At that point the presumption
19 of innocence would fall away.

20 Now, the question that obviously comes up is
21 what is a reasonable doubt. The words, as you can see,
22 practically define themselves. It is a doubt founded
23 upon reason, arising out of the evidence in the case or the
24 lack of evidence, as the case may be. It is a doubt
25 which a reasonable person has after carefully weighing all

2 the evidence. Reasonable doubt is a doubt which appeals
3 to your reason, your judgment, your common sense and your
4 experience.

5 Reasonable doubt is not caprice, whim, specu-
6 lation, guesswork, conjecture or suspicion. Reasonable
7 doubt is not an excuse to avoid the performance of an
8 unpleasant duty. Reasonable doubt is not sympathy for
9 a defendant.

10 If after a fair and impartial consideration
11 of the evidence you can candidly and honestly say that you
12 are not satisfied with the guilt of the defendant, that
13 you do not have an abiding conviction of his guilt,
14 in sum, if you have such a doubt as would cause you as a
15 prudent person to hesitate before acting in matters of
16 importance to yourself, then you have a reasonable doubt.

17 In that circumstance it is your duty to acquit.

18 If, on the other hand, after such impartial
19 and fair consideration of all the evidence you candidly
20 and honestly say that you do have an abiding conviction
21 of the defendant's guilt, such a conviction as you would
22 be willing to act upon in important and weighty matters
23 in the personal affairs of your own life, then you have no
24 reasonable doubt, and under such circumstances it is your
25 duty to convict.

One final word on this subject. Reasonable doubt does not mean a positive certainty or beyond all possible doubt. If that were the rule few persons, however guilty, would ever be convicted. It is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature cannot be proved by mathematical certainty. Therefore, the law in a criminal case is that it is sufficient that the guilt of a defendant be established beyond a reasonable doubt, not beyond all possible doubt.

Now, the indictment in this case contains four counts. I am going to send a copy of the indictment into the juryroom for you to have before you. Each count is a separate crime. I am going to read it to you.

"Counts 1 and 2. On or about the dates hereinafter set forth, in the Southern District of New York"-- and I charge you at this point that the Southern District of New York includes the island of Manhattan, which is New York County, and counties almost all the way up to Albany; but the only one that is relevant for our purposes is this county we are in--"in the Southern District of New York, Robert L. Hopkins, the defendant, being an employee of the Bankers Trust Company, 85 Delancey Street, New York, New York, a bank the deposits of which were then

insured by the Federal Deposit Insurance Corporation, unlawfully, willfully and knowingly did embezzle, abstract and purloin moneys, funds and assets entrusted to the custody and care of said bank, namely, cash in amounts in excess of \$100 contained in the night deposit bags described below, which were deposited with the Bankers Trust Company by Cohen Optical Company, 117 Orchard Street, New York, New York."

Count 1 recites "Date February 1, 1974, bag 693," and Count 2 describes "Date February 4, 1974, bag 523."

"Counts 3 and 4. The Grand Jury further charges on or about the dates hereinafter set forth, in the Southern District of New York, Robert L. Hopkins, the defendant, unlawfully, willfully and knowingly and with intent to injure and defraud the Bankers Trust Company, 85 Delancey Street, New York, New York; a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation, and another company, namely, Cohen Optical Company, 117 Orchard Street, New York, N.Y., and to deceive an officer of said bank, did make false entries in the books, reports and statements of the Bankers Trust Company as hereinafter set forth."

Then under Count 3, the date of February 1st,

the nature of the book, report and statement is set forth as the Night Depository Deposit Control Sheet, and Count 4 gives the date of February 4, 1974, the nature of the book, report and statement being listed as the Night Depository Deposit Control Sheet.

Now, each of the four counts in the indictment charges a separate offense. You must consider each count separately and render a separate verdict as to each count.

Counts one and two charge the defendant with violating a federal law which provides in part as follows:

"Whoever, being an employee of any insured bank, embezzles, abstracts or purloins any monies or funds entrusted to the custody and care of any such bank," and then it goes on, and I am summarizing at this point, is guilty of an offense.

For purposes of the law, "'insured bank' includes any bank, banking association, trust company or other banking institution the deposits of which are insured by the Federal Deposit Insurance Corporation."

In order to find the defendant guilty of the offense charged in counts 1 and 2 you must find each of the following four elements beyond a reasonable doubt as to the count in question:

First, that on or about the date specified in

the count the defendant embezzled, abstracted or purloined moneys, funds or assets entrusted to the custody and care of the Bankers Trust Company.

Two, that the defendant, when he committed the acts, was an employee of the bank.

Three, that he acted unlawfully, willfully and knowingly.

And four, that at the time of the offense charged in the count the Bankers Trust Company was a bank the deposits of which were insured by the Federal Deposit Insurance Corporation.

Let me give you those again.

First, that about the date specified in the count under consideration the defendant embezzled, abstracted or purloined moneys, funds or assets entrusted to the custody and care of the Bankers Trust Company.

Second, that the defendant, when he committed the acts charged, was an employee of the bank.

Third, that the defendant acted unlawfully, willfully and knowingly.

And fourth, that at that time the bank was one whose deposits were insured by the Federal Deposit Insurance Corporation.

Let's go into a little more detail on the elements.

The first element you are required to find in order to find the defendant guilty on either count one or count two is that he embezzled, abstracted or purloined money, funds or assets.

Now, what do these terms mean? Embezzlement occurs when an employee wrongfully appropriates to his own use money which has been entrusted to him or into whose hands it has lawfully come as a result of his employment or position of trust.

To abstract is to take or withdraw from. To abstract a portion of the funds at the bank is to withdraw such funds from the possession or control of the bank.

To purloin means quite simply to steal. To steal is to carry away the property of another without any right to the property and without the consent of the owner with intent to keep that property or make use of it wrongfully.

Each of the first two counts charges that the defendant on a specified date embezzled, abstracted or purloined cash in an amount in excess of \$100. I charge you that the government is not required to prove the exact amount embezzled, abstracted or purloined in order to sustain its burden of proof on either count 1 or count 2. It is sufficient if you find that the amount embezzled, abstracted or purloined was in excess of \$100.

The second element you must find is that the defendant was an employee of the bank at the time of the offense. There has been testimony and documentary evidence here, if you credit it, to the effect that the defendant was continuously employed by the bank in various positions from September 21, 1973 to March 7, 1974. On this evidence, if you credit it, you may find that the second element has been satisfied.

In order to convict you must find beyond a reasonable doubt that the defendant acted unlawfully, willfully and knowingly. These terms may be explained to you as follows:

Unlawfully means contrary to law. Hence, to do an act unlawfully means to do something which is contrary to law.

An act is done willfully if it is done knowingly, voluntarily and deliberately.

An act is done knowingly if it is done voluntarily and purposely and not because of mistake, mere negligence or some other innocent reason.

In determining whether a defendant has acted knowingly and willfully it is not necessary for the government to establish that the defendant knew that he was breaking any particular law or particular rule.

Questions of knowledge and willfulness, like all other questions of fact, are solely for you to determine. Medical science has not as yet devised an instrument by which you can go back in time and look in a man's mind and determine what his purpose was when he performed particular acts. Rarely is there direct proof available that one had knowledge of a fact or intended to bring about a result.

The intent with which an act is done may often be more clearly and conclusively shown by the act itself or by a series of acts rather than by words or explanations of the act after its occurrence.

Frequently the acts of individuals speak their intentions more clearly than do words. One may here apply the old adage "actions speak louder than words."

Accordingly, intent, willfulness and knowledge can be established, if you credit it, by surrounding facts and circumstances as of the time the acts occurred or the events took place and the reasonable inferences to be drawn from those acts. This is referred to as circumstantial evidence, as to which I will explain to you more fully later in the charge, and if believed, is as acceptable as is direct evidence of the fact.

1 You should, therefore, in these matters, apply
2 your common sense and draw such reasonable inferences
3 as may be warranted from facts which are proved to your
4 satisfaction. In determining these issues you may consider
5 any statements made and acts done or omitted to be done
6 by the defendant together with all the other facts and
7 circumstances in evidence in this case.
8

9 Now, I have already mentioned the fourth
10 element, which I will momentarily explain. You are required
11 to make a finding that at the time of the acts charged in
12 the indictment in counts 1 and 2, indeed, all four of them,
13 as a matter of fact, but for present purposes 1 and 2, the
14 Bankers Trust Company was a bank the deposits of which
15 were insured by the Federal Deposit Insurance Corporation.
16

17 However, the government does not have to prove
18 that the defendant knew that the bank was so federally
19 insured.

20 In this connection the parties have agreed upon
21 a stipulation, which is in evidence, to the effect that on
22 the dates in question, February 1, 1974 and February 4,
23 1974, the Bankers Trust Company was a bank the deposits of
24 which were insured by the Federal Deposit Insurance Corpor-
25 ation. That stipulation is the equivalent for your pur-
 poses of live testimony as to that fact by a qualified

witness.

Now let's turn to counts 3 and 4. These charge the defendant with violating a federal law which provides in part as follows:

"Whoever makes any false entry in any book, report or statement of such bank with intent to injure or defraud such bank"-- "such bank" has reference to a bank the deposits of which are insured by the Federal Deposit Insurance Corporation--"or any other company, body politic or corporate or any individual person or to deceive any officer of such bank," it goes on to say, is guilty of an offense.

In order to find the defendant guilty of the crimes charged in counts 3 and 4 you must find beyond a reasonable doubt as to the count under consideration each of the four following elements:

First, that on or about the date charged in the count under consideration the defendant unlawfully and willfully made a false entry in a book, report or statement of the Bankers Trust Company.

Second, that the defendant knew the entry was false when it was made.

Third, that the false entry was intended by the defendant to injure or defraud the bank or another company,

namely, the Cohen Optical Company, or to deceive any officer of the bank.

Fourth, that on the date of the alleged false entry the Bankers Trust Company was a bank the deposits of which were insured by the Federal Deposit Insurance Corporation.

Let me read those to you again: first, the four elements, you must find each of them beyond a reasonable doubt for there to be a finding of guilt.

First, on or about the date charged in the count the defendant unlawfully and willfully made a false entry in a book, report or statement of the bank.

Second, he knew the entry was false when he made it.

Third, the false entry was intended by him to injure or defraud the bank or another company or to deceive an officer of the bank.

And fourth, on the date of the alleged false entry the bank was a bank the deposits of which were insured by the FDIC.

Turning to a little detail in these items, the word "entry" as used in the law, which the defendant is charged with violating in counts 3 and 4, means an item in an account. To make any entry is to make a

record, to set something down in writing, to record.

The evidence in this case, if you credit it, would permit you to find that the check marks on the night depository control sheets were entries within the meaning of the law.

The check marks at issue, according to what the government urges upon you from the evidence, were placed on the Bankers Trust Night Depository Deposit Control Sheets for February 1, 1974 and February 4, 1974 respectively. There is evidence before you from which you may find that the night depository deposit control sheets are books, reports and statements of the bank made in the ordinary course of business and used in its operations.

Now, the instructions I earlier gave you with regard to the definition of unlawfully, willfully and knowingly apply equally here and must guide you in your deliberations on the second and third elements of counts 3 and 4, the requirements of knowledge and intent to defraud or injure the bank or Cohen Optical Company or to deceive an officer of the bank.

The fourth element, the instructions I gave you with regard to the fourth element of the offense charged in counts 1 and 2 apply equally here, that is, the requirement that you must find as a fact that the

deposits of the Bankers Trust Company were insured by the Federal Deposit Insurance Corporation on the dates alleged in those counts or the date alleged in the count you are considering.

Now, there has been testimony here to the effect that the defendant told people he had made the two check marks on the night depository control sheets and that he purchased various items of clothing and a color television set between February 1st and February 6, 1974. If you credit these statements attributed to the defendant, you may consider these in the course of your deliberations on the various counts.

Now, you heard me a little bit earlier refer to circumstantial evidence and I am going to at this point go into a little bit of detail to explain to you the difference between what we call direct evidence and what we call circumstantial evidence.

Direct evidence, ladies and gentlemen, is where a witness has testified to something the witness saw, heard or observed, what the witness knows of his own knowledge, that which came to him through use of his own senses. That's direct evidence.

Circumstantial evidence, on the other hand, is where a fact is established from another fact or facts

from which, in terms of common experience, you can logically conclude that the fact sought to be established does exist.

Let me give you an example so that you can see this concretely.

Let's assume this morning when you came into the courtroom the sun was shining, the blinds behind you were drawn, so that you could not see out, and it had been a dry, clear day when you entered the building.

Now, the fact that it was a dry clear day when you walked up the steps of the U.S. courthouse, that observation is what we call direct evidence, because you are looking at it, you are seeing what the weather is. You looked at the heavens and you saw what it looked like.

Let's assume that at the close of my charge a man walks in that door with an umbrella, shaking drops of water off it, another man comes in with a raincoat with spots of water all over the shoulders. Now, you're seeing the man with the umbrella and the raincoat with the drops of water on the shoulder, that's direct evidence, because you are looking at it, you are observing it with your senses. But you could conclude from that that since you had come into the building it had stopped being a nice day and it had started to rain.

In other words, you go from the observed fact

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to a fact that reasonably follows from the observed fact.
Now, the fact that it has begun to rain is what we call a
fact proved by circumstantial evidence.

That's really all there is to it. You go
from one fact that is before you that you credit and you may
draw a reasonable inference from that to another fact
that reasonably follows;

Now, circumstantial evidence, if you credit it,
is of less value than direct evidence. In either case,
whether the evidence is circumstantial or direct, you must
be convinced of the guilt of the defendant on any count and
on each count before you can convict. A conviction can
be based upon circumstantial evidence or direct evidence,
but it must be one or the other.

Now, there are times in this case obviously
where different inferences may be drawn from facts. The
government asks you to draw one set of inferences while the
defendant asks you to draw others. It is for you to decide,
and for you alone, as to what inferences you may reasonably
and fairly draw from the evidence before you.

One of your major tasks I am sure you have
seen developing before you over these days here is your
assessment of the defendant's claim that he did not take
any money from the bank, that the money he had he found

in a phone booth in Greenwich Village. The defendant urges upon you in this connection the testimony of Rocky Jeffers and the testimony of Messrs. Palm and Shea as to what the defendant told them on February 7th and 8, 1974.

I charge you that a showing that a defendant had an opportunity to commit a theft, that money disappeared, and that simultaneously the defendant acquired substantial wealth, absent a satisfactory explanation thereof, are facts from which you may but need not infer that the defendant was a thief or embezzler.

I want to charge you in this connection, however, you are never required to make this inference. It is the exclusive province of you, the jury, to determine whether the facts and circumstances shown by the evidence warrant any such inference.

Consequently, a central question is do you find that the defendant's explanation of having the money is a satisfactory one. If you do, then you may not draw the inference he was the thief or embezzler, as I have charged you. Indeed, I charge you that if you are satisfied with the explanation of the source of the money it is your duty here to acquit on all the counts.

On the other hand, if you are not satisfied with the explanation of the source of the money and find

it to be false, you may consider that explanation as some evidence bearing upon the defendant's guilt.

Ordinarily it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his innocence. Whether or not evidence as to a defendant's voluntary explanation or statement points to a consciousness of guilt and the significance to be attached to any such evidence are matters exclusively within your province as the jury.

Now, certain charts and summaries have been admitted before you. These are admitted as aides to you. They are mere visual representations of information or data as is already set forth in the testimony of witnesses or in documents that have been received in evidence. They are of no greater value than the testimony or the documents upon which they are based. If you decide the charts, schedules or summaries correctly reflect the data set forth in the testimony and in the exhibits on which they are based you may consider them and give them such weight as aides as you feel they should have.

Now, I have not referred to much evidence upon which the parties rely. The case is a relatively simple one and the counsel have done it well here. I want

to firmly say that all evidence, whether they or I have referred to it, is important and should be considered by you, as well as all of the contentions of both parties.

In referring to testimony all of us, counsel and the Court alike, seek to state the substance of it with complete accuracy, and again I want to say if there has been any reference to testimony which does not agree with your recollection you are to disregard that reference, for it is your recollection and yours alone that governs.

Also, I want to say that just because evidence is uncontradicted in the record you need not accept it if you do not find it to be believable.

You alone, as I have said before, are called upon to decide the fact issues. How do you do this? Your determination, ladies and gentlemen, on the issues of credibility depends very largely on the impression that a witness or witnesses made upon you. Was that witness telling the truth or was he or she giving you an accurate version of what happened?

As I said, when you walk in the door of this courtroom and you sit in this jury box while the trial is going on and while you are deliberating you keep your good common sense and your good judgment with you. You decide whether a witness has told a truthful and straight forward

story, whether he or she had a motive to testify falsely, whether there is any reason a witness might color his or her testimony.

The ultimate question for you to decide in passing upon credibility is did the witness that you are considering tell the truth here before you as to essential matters. It is for you to say whether a witness is truthful in whole or in part in light of his or her demeanor and of all the evidence in the case.

In evaluating testimony you may consider the interest or the lack of interest of any witness in the outcome of the case, the bias or prejudice of a witness, if you find that he or she has one, the appearance, the manner in which the witness gave testimony on the stand and the opportunity that the witness had to observe or note the facts concerning which that witness testified, the probability of the witness' testimony when viewed in the light of all of the evidence in the case.

These are all items to be taken into your consideration in determining the weight, if any, that you will assign to the witness' testimony. The testimony of a witness may fail to conform to the facts as they occurred because he or she is intentionally telling a falsehood or because he or she did not accurately see or hear that about

which he or she testified or because his or her recollection of the event is faulty or even because he or she has not expressed himself or herself clearly in giving the testimony.

You are also entitled to consider the possibility that where a witness is called upon to testify long after an event and at great length inconsistent statements may be the result of an innocent mistake or a lapse of memory rather than a deliberate intention to falsify or shade the facts. In short, it is not unusual in lengthy proceedings to utter inconsistencies at some stage along the line.

If your consideration of the evidence makes it appear that there are differing versions of the facts resulting in a discrepancy in the evidence you will have to consider whether the apparent discrepancy involves understandable error which can be reconciled by fitting the two stories together in a rational relationship. If, however, you believe that is not appropriate or possible, you will then have to determine which of the conflicting versions you will accept.

You may, if you wish, accept so much of the testimony of a witness as you deem true and disregard what you feel is faulty or mistaken or unclear. You are at liberty, if you deem it proper under all the circumstances to do so, to disbelieve testimony in whole or in part even

though, as I have said, it is otherwise not impeached or contradicted.

If you find the any witness has testified falsely as to a material fact before you the law permits you to disregard completely the entire testimony of that witness on the principle that one who testifies falsely about one material fact is quite likely to testify falsely about everything.

However, you are not required to consider such a witness as totally unworthy of belief. You may, if you wish, accept so much of his or her testimony as you believe true and reliable and disregard that which you feel is false or unworthy of acceptance.

Now, you have heard certain government employees, law enforcement officials, who were witnesses here, and as to them the rule is very simple. The fact that certain witnesses were government employees, agents of the Federal Bureau of Investigation, does not entitle their testimony to any greater weight or consideration than that accorded to any other witness in the case. You are to evaluate their credibility the same way that you would that of any other witness.

Now, Mr. Hopkins did not testify in this case on his own behalf. Under our Constitution he had no

obligation to testify or to present any other evidence, because as I have said, the burden is on the government to prove the defendant guilty beyond a reasonable doubt as to all of the elements of the case, and that burden remains upon the government throughout the entire trial and does not shift.

Further, the defendant has the right to rely upon the failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross examination of the government's witnesses.

The law does not impose upon a defendant the duty of producing any witnesses whatsoever. You may not consider in any way whatsoever in your deliberations or attach any significance to the fact that Mr. Hopkins availed himself of his constitutional right not to testify. No adverse inference may be drawn against him by you because of his exercise of this privilege.

In short, the fact that Mr. Hopkins did not testify may not be considered by you at all.

I am getting somewhat close to the end. You must consider each count separately and you shall return a separate verdict on each count. If you fail to find beyond a reasonable doubt that the law has been violated you should not hesitate for any reason to return a verdict of

acquital.

But if, on the other hand, you should find that the law has been violated as charged, you should not hesitate because of sympathy or other reason to render a verdict of guilty.

The government to prevail against the defendant must, as I have said, prove each essential element of each charge by the required degree of proof, as I have charged you. If the government succeeds, your verdict should be guilty. If the government has failed, your verdict must be not guilty. Your verdict, ladies and gentlemen, must be unanimous.

Under your oath as jurors you cannot and you are not to allow any consideration of a sentence which might be imposed upon the defendant if convicted to enter into your deliberations or influence your verdict in any way. Your duty is to decide the facts here, to decide this case solely and only upon the evidence before you. In the event of a conviction the duty of imposing sentence rests solely with the court.

Each of you ladies and gentlemen as a juror is entitled to his or her own opinion, but each should, however, exchange views with your fellow jurors. That is what jury deliberation means, to discuss and consider the

evidence, to listen to the arguments of fellow jurors, to present your individual views, to consult with one another, and to reach agreement based solely on the evidence, if you can do so without violation to your individual judgments.

Each must decide the case for himself or herself after a consideration and discussion with his or her fellow jurors, but you should not hesitate to change an opinion which after discussion with your fellows appears erroneous.

However, equally, if after careful consideration of all the evidence, the arguments of your fellow jurors, you entertain a conscientious view that differs from others, you are not to yield your conviction simply because you are outnumbered or outweighed.

Your final vote must reflect your conscientious conviction as to how the issue should be decided. If the government has failed to carry its burden, you should acquit. That is your duty. If the government has carried its burden you must not flinch from your sworn duty, but you must convict.

During your deliberations on the innocence or guilt of the defendant one or more of your members may have a question for the Court or desire to have certain or, indeed, all of the exhibits in the juryroom or to have certain

1 testimony read back to you. If you generally have a need
2 for that after discussion you may communicate with me in
3 writing and ask for those things. You may also have
4 other reasons to communicate with the Court, such as when you
5 have reached a verdict. If this occurs send me a note.
6

7 In doing so I caution you never to indicate
8 in any communications how your vote, if any, stands at
9 that particular time. Your deliberations are secret and it
10 would be a breach of that secrecy to communicate how you are
11 voting at any time, except to announce that you have reached
12 a unanimous verdict.

13 Now, ladies and gentlemen, that concludes
14 my charge on the law.

15 Any requests or exceptions?

16 Mr. Lipson?

17 MR. LIPSON: I have none.

18 THE COURT: Mr. Bentley?

19 MR. BENTLEY: The government has none, your
20 Honor.

21 THE COURT: All right.

22 (Alternate jurors excused.)

23 (A marshal was sworn.)

24 (At 1 p.m. the jury retired to deliberate upon
25 a verdict.)

CERTIFICATE OF SERVICE

signed on April 25, 1977

I certify that a copy of this [REDACTED] appendix has been [REDACTED] the United States Attorney for the Southern District of New York.

R. L. Buly